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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1328

ROY D. KEEHN, as Receiver of Central Mutual Insurance Company of Chicago, an Illinois corporation,
Petitioner,

vs.

BRADY TRANSFER & STORAGE COMPANY, an Iowa corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

PAGE

Petition for a Writ of Certiorari 1

Statement 1

Jurisdiction 5

Questions presented 6

Reasons for granting the writ 6

Brief in support of Petition 9

I. The decision of the Circuit Court of Appeals is in direct conflict with the decisions of the Fourth Circuit Court of Appeals in the case of Keehn v. Barnwell Bros., 137 Fed. (2) 257 and Keehn v. Parrish Dray Line, 145 Fed. (2) 646 9

II. The decision of the Circuit Court of Appeals is in conflict with applicable local decisions holding that the fraud as alleged by Respondent is not a defense where rights of innocent third parties have intervened 17

III. The obligation of the Respondent to pay its assessment is based on the Illinois statute, the by-laws of the company and the provision for contingent liability in the policy, and under applicable decisions of this court Section 8909 of the Iowa statutes does not relieve the Respondent of this obligation 20

Conclusion 26

Appendix 29

Sections 8909, 8955, 8974 and 8975, Code of Iowa .. 29-30

PAGE

LIST OF AUTHORITIES.

Barker v. Lamb & Sons, 99 Ia. 265, 68 NW 686 17

Broderick v. Rosner, 294 U. S. 629 ..... 5, 15

Commissioner of Banks v. Cosmopolitan Trust Co., 253 Mass. 205, 148 NE 609 19

Commonwealth ex rel Schnader, Attorney General v. Keystone Indemnity Exchange, 335 Pa. 333, 6 Atl. (2) 821 25

Cook v. Federal Life Insurance Ass'n., 74 Ia. 746, 35 NW 500 24

Corey v. Sherman, 96 Ia. 116, 64 NW 828 19

Corson v. Iowa Mutual Fire Insurance Ass'n., 115 Ia. 485, 88 NW 1086 24

Dettra v. Kestner, 147 Pa. 566, 23 Atl. 889 20

Grimes v. Northwestern Legion of Honor, 97 Ia. 315, 64 NW 806 24

Keehn v. Barnwell Bros., 137 Fed. (2) 257 9

Keehn v. Parrish Dray Line, 145 Fed. (2) 646 ..... 9, 12

Modern Woodmen of America v. Mixer, 267 U. S. 544 ..... 5, 16

Pink, Superintendent of Insurance of the State of New York v. Town Taxi Co., Inc., 138 Me. 44, 21 Atl. (2) 656 24

Scott v. Abbott, 160 Fed. 573 19

Sherman v. Frasier, 112 Ia. 236, 83 NW 886 18

Sovereign Camp v. Bolin, 305 U. S. 66 ..... 5, 13

Swing v. Red River Lumber Co., 117 NW 442 20

Taggart Insurance Commissioner v. Wachter (Md.) 21 Atl. (2) 141 25

STATUTES.

Illinois Revised Statutes (State Bar Ass'n. Ed. 1935, Chap. 73, Par. 300, Sec. 14 2

Code of Iowa, Sections 8909, 8955, 8974 and 8975 .... 20, 21, 23

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BRADY TRANSFER & STORAGE COMPANY, an Iowa corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Roy D. Keehn, as Receiver of Central Mutual Insurance Company of Chicago, an Illinois corporation, respectfully represents that:

I.

Summary Statement of the Matter Involved.

This is a suit by the statutory receiver of an Illinois mutual assessment insurance association, Central Mutual Insurance Company of Chicago, (hereinafter sometimes called "Company") for collection of an assessment made

against the respondent as a policyholder and member of said Company. The District Court of the United States for the Northern District of Illinois, Eastern Division, granted the motion of petitioner for a summary judgment against respondent, and upon appeal this judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit.

The facts are not in dispute. The respondent, an Iowa corporation, was admittedly a member of the company by virtue of its acceptance and retention of a policy of insurance. The respondent "had the benefit of insurance protection for eleven months, and in that time the company investigated and settled a number of claims against defendant (respondent); and it had this protection at lower rates because the policy was issued by a mutual company," (R. 67.) The company was organized under the Illinois statutes, Chapter 73, State Bar Association, Edition 1935, Section 287, *et seq.*, and in accordance with by-laws of the company adopted pursuant to said statutes, the policy in question contained a proper provision for assessment liability.

This provision was contained in all policies issued by the company pursuant to the mandatory provisions of the Illinois statutes applicable to such companies as follows:

> "Par. 300. Premiums—By-laws—Liability of policyholders, Sec. 14. *The by-laws shall provide for a cash premium and may limit the contingent liability of the members to an amount not less than one or more than ten times the cash premium expressed in the policy. The maximum contingent liability of the holder of each policy shall be plainly stated as a part of each policy. The by-laws* may also provide for policies to be issued for cash premiums without contingent liability of policyholders, as provided in section 15. (Italics ours)

The policy in question was issued for a term of one year,

commencing on September 7, 1935, and ending on September 7, 1936, and was cancelled by mutual consent on August 16, 1936. At the suit of the Attorney General of the State of Illinois, the company was found to be insolvent on January 11, 1937, and was taken over for liquidation by the Director of Insurance of the State of Illinois at that time and the liquidation proceeded by the Receiver appointed by said Director of Insurance, and under the direction of the Circuit Court of Cook County, Illinois, pursuant to the Illinois statutes. The Circuit Court of Cook County on March 19, 1940, ordered an assessment of one times the cash premium levied against all holders of policies in the company who had held a policy at any time from January 31, 1935 to January 11, 1937, inclusive, and the Receiver was authorized to collect the same.

By further order of the Circuit Court of Cook County on July 1st, 1940, Assessment Roll No. 1 was ordered spread of record in said court, levying an assessment against the policyholders therein named, including the respondent corporation. The assessment against respondent was $10,096.89 which was not paid when demanded by the receiver. (R. 42.)

The cause was removed to the District Court of the United States for the Northern District of Illinois, Eastern Division, by reason of the diversity of citizenship of the parties.

The amended and substituted answer of the respondent corporation was filed on June 26, 1944 (R. 10), and the case being at issue, petitioner filed in the District Court of the United States his motion for summary judgment pursuant to the statute (R. 34), which motion was supported by the affidavit of petitioner, (R. 34-58).

Thereafter on February 13, 1946, the District Court granted petitioner's motion and entered a summary judgment against respondent in the sum of $9,280.73 with interest thereon from March 13, 1946, (R. 72) (64 Fed. Supp. 392).

On April 15, 1946, the respondent filed in the clerk's office of the District Court, its notice of appeal, and on January 7, 1947, the United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion (R. 89-100), reversing the judgment appealed from and remanded the cause to the District Court with directions to proceed in accordance with the views expressed in the opinion. Petition for rehearing (R. 105) was filed within the time fixed by law, and, on February 5, 1947, said petition for rehearing was denied. February 13, 1947, the mandate of the Circuit Court of Appeals was issued and forwarded to the clerk of the District Court. The opinion of the Circuit Court of Appeals is reported in 159 F. (2nd) 383.

The defenses relied on by respondent in the Circuit Court of Appeals were two:

1. The third separate defense (R. 13-17); that the insurance company secured its license to do business in Iowa by means of fraudulent representation; that the policy was therefore void, and could not be the basis of any assessment liability; and that such fraudulent representation consisted of representing itself to be solvent when in fact it was insolvent, in violation of pertinent sections of the Iowa statutes.

2. The Fourth Defense, (R. 17-19); that the Iowa statute provided that a copy of the application should be attached to the policy and that such should contain therein a reference to the contingent liability; no application being attached, there is no assessment liability.

II.

Jurisdictional Statement.

Jurisdiction is invoked under Section 240 of the Judicial Code of the United States, (Tit. 28 U. S. C., Sec. 347) and United States Supreme Court Rule 38.

Petitioner is advised by counsel and believes that the judgment of the Circuit Court of Appeals violates the rights of petitioner in the following respects:

(1) The decision is in conflict with two decisions of the United States Circuit Court of Appeals for the Fourth Circuit on the same matter and, in fact, involving an assessment against other members and policyholders of the same mutual company.

(2) An important question of local law has been decided in a way probably in conflict with applicable local decisions.

(3) The decision departs so far from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

(4) It involves an impairment of the obligation of contract contrary to Article I, Section 10, of the Constitution of the United States.

(5) It involves a deprivation of property without due process of law contrary to Article XIV, Section 1 of the Amendments to the Constitution of the United States.

In these circumstances petitioner requests review under the federal statute above cited.

The decisions of this court which are believed to sustain jurisdiction to review and reverse the ruling of the Circuit Court of Appeals are as follows:

Modern Woodmen of America v. *Mixer*, 267 U. S. 544.

Sovereign Camp v. *Bolin*, 305 U. S. 66.

Broderick v. *Rosner*, 294 U. S. 629.

III.

The Questions Presented.

The questions presented are as follows:

1. Did the court improperly decide the issues in conflict with prior decisions of the Fourth Circuit Court of Appeals.

2. Did the court improperly construe the local law in conflict with applicable local decisions?

3. May Sec. 8909 of the Iowa statutes be applied, without violation of the constitutional guaranties providing for equal protection of the laws and against impairment of contracts, to assessments levied in judicial proceedings in Illinois for the liquidation of an insolvent Illinois mutual assessment insurance association?

4. May any court constitutionally treat membership in a foreign mutual assessment plan insurance association as though the obligations thereby created were merely those of an Iowa contract?

5. May the operation of an Iowa statute nullify valid contractual obligations, based on Illinois statutes, voluntarily assumed by citizens of Iowa, as members of a mutual insurance organization chartered in another state?

IV.

The Reasons Relied on for Allowance of the Writ.

A writ of certiorari should be granted for the following reasons:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with two decisions of the United States Circuit Court of Appeals for the Fourth Circuit, involving the collection of assessments against former members and policyholders in the liquidation of the same insurance organization.

2. The decision of the Circuit Court of Appeals is based on construction of certain Iowa statutes, which construction is arbitrary, unwarranted and improper, and in conflict with decisions of the Supreme Court of Iowa involving the same principles and almost identical factual situations.

3. Other policyholders and members of Central Mutual Insurance Company of Chicago residing in many other states have been required by the courts thereof to pay the assessments adjudged to be due petitioner, based upon the assessment levied in and approved by the Circuit Court of Cook County, Illinois, in suits brought in these various other states. It is unfair and inequitable to the creditors of Central Mutual Insurance Company of Chicago and to the thousands of other members and policyholders who have already paid these assessments and it interferes with an orderly and equitable liquidation of the company's affairs and unreasonably burdens and otherwise obstructs interstate commerce to permit Iowa policyholders to evade their assessment liability.

4. Many of the states in which Central Mutual Insurance Company of Chicago did business have by statute imposed conditions somewhat similar to those in Iowa relied upon by respondent. It will clarify the situation and obviate the necessity of considerable further litigation for this court now to determine with finality the power of the states to nullify statutory obligations voluntarily assumed by their citizens as members of mutual insurance companies chartered in other states.

Wherefore, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals of the United States for the Seventh Circuit to the end and that said cause may be reviewed and determined by this court as pro-

vided by law; that the judgment of the Circuit Court of Appeals of the United States for the Seventh Circuit be reversed and the judgment of the District Court of the United States, Northern District of Illinois, Eastern Division, be reinstated; and that petitioner may have such other and further relief in the premises as to the court may seem appropriate and just.

ROY D. KEEHN, as Receiver of
Central Mutual Insurance Company
of Chicago, Petitioner

By: Ferre C. Watkins
William H. Beckman
Charles F. Hough
Ira W. Hurley
Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.[1]

The Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 159 Fed. (2nd) 383.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is in direct conflict with the decisions of the Fourth Circuit Court of Appeals in the case of Keehn v. Barnwell Bros., 137 Fed. (2nd) 257 and Keehn v. Parrish Dray Line, 145 Fed. (2nd) 646.

The decision of the Circuit Court of Appeals for the Seventh Circuit sustained respondent's third separate defense that the insurance policy sued on is void because petitioner secured its license to do business in Iowa by fraudulently representing that it was solvent; and respondent's fourth separate defense that a copy of the application for insurance referring to the contingent liability of the insured was not attached to the policy as provided by Iowa statute. Petitioner's position is that neither of these defenses may be successfully asserted by respondent as a defense to the assessment in question. The decisions of the Circuit Court of Appeals for the Fourth Circuit clearly support petitioner's position. *Keehn* v. *Barnwell Bros.*, 137 Fed. (2nd) 257 (CCA 4th) involved assessment col-

[1] Statement, jurisdiction and questions presented, which are set out in the petition, will not be repeated here.

lections against former members and policyholders of the same mutual company involved in the present case. In that case it was contended that the receiver was the agent of the Director of Insurance of the State of Illinois and therefore estopped from collecting the assessment from the policyholders inasmuch as the Director by allowing the Company to do business represented in the course of his official duties that the company was solvent from January 31, 1935 to January 11, 1937, the period of insolvency upon which the assessment was based. This defense is substantially the same defense as respondent's third separate defense sustained by the Circuit Court of Appeals for the Seventh Circuit in the present case. The Circuit Court of Appeals in the *Barnwell Bros.* case overruled the defense and stated, P. 266,

> "There is no proof that the defendant relied on the director's statements when prior thereto on January 9, 1935, the defendant accepted the first policy and put it into use in North Carolina. Moreover, it is obvious that in this case the receiver is acting on behalf of the creditors to secure them the protection afforded by the Illinois statutes, and that the statements of the director made in the discharge of a governmental function furnish no basis for the application of the principle of estoppel."

The same is of course true with regard to the license issued by the Director of Insurance of the State of Iowa and respondent's reliance on same.

The Circuit Court of Appeals for the Fourth Circuit in the *Barnwell Bros.* case said further, P. 265:

> *"Equally without merit is defendant's contention that the first policy in suit is not enforceable because it was delivered to the defendant in New York in December, 1934 when the Insurance Company was not qualified to do business either in New York or North*

Carolina. • • • the defendant paid the premiums on the policy and made use of it as a basis for doing business in the state."

Another claim of fraud was made by the defendant in the *Barnwell Bros.* case, which it was claimed invalidated the policy. The fraud charged was that at the time of the issuance of the first policy, the president of Central Mutual Insurance Company promised that he would furnish a policy of Lloyds of London to insure the policyholder against an assessment. The District Court found there was no fraud, but in passing on the charge, the Circuit Court of Appeals said, P. 265:

> "Moreover, the evidence is clear and strong that notwithstanding the failure of the insurance company to furnish indemnity from Lloyds, the defendant did not repudiate the policy which did not incorporate the promise, but elected to accept the policy, paid the monthly premium thereon, and filed it in 8 states in order to qualify to do business therein. In addition the defendant filed a claim with the receiver for losses insured under the policy and received a dividend thereon. Having made its election the defendant cannot now repudiate its obligations under the policies but is relegated to such counter-claim against the receiver for breach of the oral promise as the law may recognize."

In the case at bar the situation is practically identical. Conceding that respondent actually did rely upon the representations of Central Mutual made to the director of insurance of the state of Iowa, it nevertheless, as the defendant in the *Barnwell* case, elected to accept the policy, paid the monthly premiums thereon and filed copies of policies in New York, Illinois, Iowa, Ohio, Missouri, and Pennsylvania in order that its trucks might operate in those states and collected on many claims made on said policy, (R. 54-56); Finding of District Court, (R. 67).

The decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Keehn, Receiver,* v. *Parrish Dray Line* decided November 4, 1944, 145 Fed. (2nd) 646, involved the attempt of the petitioner to collect certain assessments in South Carolina. The policyholders defended on the ground that certain sections of the South Carolina code had not been complied with. Sections 8103, 8104, and 8097 of the South Carolina Code provide for the admission of mutual insurance companies organized outside of the state to be licensed to do business in South Carolina upon complying with certain requirements. Generally speaking, these requirements are very similar to those of Iowa and to the laws of most states. Section 8097 provides that the maximum premium payable by any member shall be expressed in the policy or in the application. It was contended by the policyholders that inasmuch as Section 8097 referred to "maximum premium" and the reference to the contingent liability in the policies was not termed a "premium," that the receiver could not recover under the laws of South Carolina. The District Court of the United States dismissed the complaint, holding among other things that the provision of the policy relating to contingent liability did not constitute an agreement to pay an additional "premium" since it is not printed on the first page of the policy in connection with the statement of the premium but on the fourth page among the general conditions.

The Circuit Court of Appeals for the Fourth Circuit reversed the District Court saying in part, Page 649:

> "We do not think that the South Carolina law requires an interpretation of the contract which will enable South Carolina policyholders to escape the assessment which policyholders of other states are compelled to pay. It seems to us quite clear that the general conditions of the policy in which the contingent lia-

bility of the policyholder is described are part of the policy by the very terms of the contract."

It is true that the South Carolina statute says that the maximum premium shall be expressed "in the policy or in the application," and there is no requirement that it be expressed in both places. The general nature of the defense, however, was very similar to respondent's Fourth Separate Defense in the instant case. The statement of the Circuit Court of Appeals for the Fourth Circuit that the South Carolina statutes did not require an interpretation which would enable South Carolina policyholders to escape the assessment is very significant. It is a logical and reasonable holding in view of the nature of a mutual assessment organization as defined by its by-laws, and the statutes under which it was created. It gives effect to the underlying principles of mutual assessment type insurance which in many respects is a simple application of the maxim of equity "equality is equity" and is in conformity with the great weight of authority.

The natural implication of the holding in the *Parrish Dray Line* case suggests an examination and consideration of the decision of this court in the case of *Sovereign Camp of the Woodmen of the World* v. *Bolin,* 305 U. S. 66, decided in 1938. In the *Bolin* case the fraternal organization adopted a by-law authorizing the issuance of life membership certificates under which a member entering the organization at an age greater than 43 years was entitled to life membership without the payment of further dues or assessments when the certificate had been outstanding 20 years. The member in question who was over 43 years of age joined the organization in Missouri and made payments for 20 years. After his death the beneficiaries brought action to recover upon the certificate. The fraternal organization defended on the ground that the by-law making the certificate

fully paid after 20 years was ultra vires and had been so declared by the Supreme Court of Nebraska. The by-law had been prior to the death of the member in question declared void by the Supreme Court of Nebraska in which state the organization was domiciled. The beneficiaries insisted that the contract was made and delivered in Missouri and was to be construed and enforced according to Missouri law, it being also contented that the organization had no license or authority to transact business in Missouri as a corporation or otherwise and was estopped to plead the defense of ultra vires.

This court reversed the decision of the Kansas City Court of Appeals of Missouri which had held the organization liable under the terms of the certificate. Mr. Justice Roberts who delivered the opinion of the court said in part, P. 75:

> "*First. The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered.* Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and *the rights of membership are governed by the law of the state of incorporation.* Another state, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile." (Italics ours)

The characteristics of fraternal benefit organizations and mutual assessment insurance companies are practically identical. Neither are corporations, inasmuch as no shares of stock are issued, both are owned by the members who compose the organization and the charges, premiums or deposits are referred to as assessments. The logic of the *Bolin* case, therefore clearly applies to the present case.

The case of *Broderick, Superintendent of Banks of New York,* v. *Rosner,* 294 U. S. 629, decided by this court in 1935 was a case involving conflict of laws between two different states in connection with assessments in one state against citizens of another arising out of stockholders' liability in a bank liquidation proceeding. The defendant was a citizen of New Jersey and a stockholder of the bank of the United States which was organized under the banking law of New York and had its place of business in New York City. In a proceeding against the stockholders an assessment was made against all of them pursuant to the New York statutes. Suit was instituted on the assessment in question in New Jersey, the residence of the defendant. The defense was based upon a statute of New Jersey which provided that no proceeding could be maintained in any New Jersey court against any stockholder of any domestic or foreign corporation to enforce statutory liability of such stockholder if such statutory liability was created by the statutes or laws of any other state or foreign country.

The plaintiff contended that to sustain the asserted bar of the statute would violate article IV, section 1 of the Federal Constitution. The Court of Errors and Appeals of the State of New Jersey sustained the defendant's contention. This decision was reversed by this court. We quote from the opinion by reason of the fact that the case, while turning on the full faith and credit clause of the Federal Constitution, nevertheless contains most if not all of the elements of the case at bar and the opinion of this court discusses the liability generally of stockholders or members of a corporation who reside in a state different from that in which the corporation is domiciled.

> "The assessment is an incident of the incorporation. Thus the subject matter is peculiarily within the regulatory power of New York, as the state of incor-

poration. 'So much so,' as was said in *Converse* v. *Hamilton*, 224 U. S. 243, 260, 56 L. ed. 749, 755, 32 S. Ct. 415, Ann. Cas. 1913D, 1292, 'that no other State properly can be said to have any public policy thereon. And what the law of Wisconsin (New Jersey) may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.' Compare *Bernheimer* v. *Converse*, 206 U. S. 516, 532, 51 L. ed. 1163, 1175, 27 S. Ct. 755. In respect to the determination of liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For "the act of becoming a member (of a corporation) is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." *Modern Woodmen* v. *Mixer*, 267 U. S. 544, 551, 69 L. ed. 783, 785, 45 S. Ct. 389. Compare *Supreme Court, R. A.* v. *Green*, 237 U. S. 531, 59 L. ed. 1089, 35 S. Ct. 724, L.R.A. 1916A, 771; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 622, 20 S. Ct. 509; *McDermott* v. *Woodhouse*, 87 N. J. Eq. 615, 618, 619, 101 A. 375. Obviously recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another State of which they were stockholders." (294 U. S. 629 at 643)

The law is clear in Illinois that assessments may be levied. They were levied on policies against former policyholders and members during the period in which the policy in the instant case was in effect (R. 5, 41). An assessment was levied against the respondent in Illinois in the instant case. The Iowa law asserted in respondent's fourth separate defense and sustained by the Circuit Court of Appeals

for the Seventh Circuit forbids an assessment under the facts of the present case. Is the Illinois law or the Iowa law to govern? Further, are the policyholders and members of the same mutual assessment company to be permitted to plead the defense of fraud such as is set forth in respondent's third separate defense in the Circuit Court of Appeals for the Seventh Circuit and not in the Circuit Court of Appeals for the Fourth Circuit?

Head on conflict is present. A decision by this court is needed so that multi-state collection of assessments in defunct mutual assessment insurance companies may proceed in an orderly fashion. For this reason alone, petitioner submits that the writ of certiorari should be granted.

II.

The decision of the Circuit Court of Appeals is in conflict with applicable local decisions holding that the fraud as alleged by Respondent is not a defense, where rights of innocent third parties have intervened.

The Circuit Court of Appeals should have held against the respondent on its Third Separate Defense. The Third Separate Defense, (R. 13-17), alleges that the Commissioner of Insurance of Iowa "was fraudulently induced to issue to said company authority to continue writing insurance within the state, during the period material to this action, and fraudulently induced this defendant, relying upon such representation, to purchase insurance in such company, without any knowledge that it was hopelessly insolvent," (R. 16). It is then alleged that by reason of these misrepresentations, the company was not legally authorized to write insurance in Iowa, and all policies issued by the Company in Iowa were *void* and of no legal effect (R. 17).

The Court in sustaining this defense relies chiefly upon the case of *Barker* v. *Lamb & Sons,* 99 Ia. 265, 68 N. W.

686, which is not at all analagous to the case at bar insofar as the facts are concerned. It was admitted in the *Barker* case that there had been no attempt to comply with the Iowa statutes governing the admission of foreign insurance companies to do business in the state, while in the instant case an unconditional license to do business was granted and issued, (R. 18).

The Circuit Court of Appeals has, in sustaining the respondent's Third Separate Defense, disregarded completely the effect of the opinions in two cases decided by the Supreme Court of Iowa and thereby has discriminated against the petitioner in failing to extend to petitioner equal protection of the laws as required by the Constitution of the United States. The first of these cases is *Sherman* v. *Frasier*, 112 Ia. 236, 83 N. W. 886, where suit was brought by the assignee for the benefit of the creditors of the Citizens Mutual Insurance Company of Waterloo, Iowa, a mutual insurance company, against members on their premium notes or pledges. The policyholders urged in defense that there was fraud practiced upon them in getting them to become members. It was claimed that the company represented directly to them that it was solvent; that the insurance would be furnished at a lower rate than asked by other companies; that the company was possessed of a paid-up guaranty fund of $50,000.00; that all of these representations were false and known to the company and its agents to be false, and that, therefore, the defendants never became members of the company and were not subject to assessment and their obligations were therefore void.

The Supreme Court of Iowa held none of these contentions amounted to a defense and said that the effect of the frauds was to render the contract not void, but voidable.

The other Iowa case disregarded by the Circuit Court

of Appeals is the case of *Corey* v. *Sherman*, 96 Ia. 116, 64 N. W. 828, which decision is to the same effect.

These two decisions should apply in a case where a suit is being prosecuted by an Illinois statutory receiver of a defunct Illinois company against former members and policyholders who are citizens and residents of Iowa. Once a corporation is admitted to do business in a foreign state, it does so subject to the same laws, rules, and regulations as domestic companies and is entitled to the same protection. The opinion of the Circuit Court of Appeals overlooks the underlying and controlling principle involved, which is the right of innocent third parties which have intervened since the issuance of the insurance policy in question. There are countless cases from almost every state involving the enforcement of liability, almost identical with that sought to be enforced here. We refer to the liability of bank stockholders and the liability of stockholders in ordinary corporations who have failed to pay for their stock. In the case of bank stockholders, the insolvency of the bank at the time the shares were purchased is no defense to a stockholder when he is sued by a receiver for the enforcement of stockholder's liability. The uniformly accepted rule is that such contracts are not void but voidable. This rule is well expressed by Chief Justice Rugg of the Supreme Judicial Court of Massachusetts in the case of *Commissioner of Banks* v. *Cosmopolitan Trust Co.*, 253 Mass. 205, 148 N. E. 609.

The rule is the same as to liability of stockholders in ordinary corporations, it being held that insolvency of the corporation does not of itself permit the stockholder to escape liability, *Scott* v. *Abbott*, 160 Fed. 573.

The statutes of the state of Iowa relied upon by respondent contain no provisions that policies issued where the re-

quired surplus has not been maintained are void. The Circuit Court of Appeals held the policy to be void solely by virtue of the fraud and deception practiced upon the Commissioner of Insurance of Iowa. It is conceded that the Central Mutual Insurance Company filed the requisite statements and reports with the Insurance Commissioner of Iowa and that the Commissioner issued to the company an unqualified certificate to do business in Iowa. The Third Separate Defense of the respondent, therefore, rests upon a foundation of fraud practiced by the company in obtaining a license to do business in Iowa. Fraud of that character is not a defense to a member being sued for an assessment. The case of *Dettra* v. *Kestner,* 147 Pa. 566, was decided upon an almost identical state of facts. The Supreme Court of Pennsylvania held that rights of innocent third parties having intervened, fraud practised on defendant could not avail him as a defense in an assessment suit.

The Circuit Court of Appeals states in its opinion (R. 95) that Iowa has not passed on the question of the right of the receiver of an insolvent insurance company to recover on contingent liability provisions where it obtained a license to do business when insolvent but cites on this point *Swing* v. *Red River,* 117 N. W. 442, which case was rejected by the trial court. The Minnesota court held that the foreign insurance company was not authorized to do business in Minnesota because of its failure to maintain its financial standing, notwithstanding the issuance to it of a qualified license to do business. However, the court also said in its opinion that if the insurance commissioner's certificates had been general in their terms, the insurance company would have been authorized to do business in the state and its policies which contained contingent liability provisions would have been valid.

The license in the instant case was admittedly general and therefore the *Swing* case does not apply. (R. 14, 65)

III.

The obligation of the respondent to pay its assessment is based on the Illinois statute, the by-laws of the company and the provision for contingent liability in the policy, and under applicable decisions of this court section 8909 of the Iowa statutes does not relieve the respondent of this obligation.

The Fourth Separate Defense of the respondent which was upheld by the Circuit Court of Appeals, is that there is no assessment liability on the respondent because there was no application attached to the policy containing contingent liability provisions. The policy however expressed this liability and there was liability under the by-laws against members and policyholders.

The respondent as a part of its Fourth Defense set out in part four sections of the Iowa statutes (R. 17-18) which are 8955, 8909, 8974, and 8975. (see appendix)

Section 8909 is the only one upon which the Circuit Court of Appeals bases its decision on the respondent's Fourth Separate Defense. The section is as follows:

> "8909. MAXIMUM PREMIUM. The maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application for the insurance. Such maximum may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium, which premium may be made payable in installments or regular assessments. No policy shall be issued for a cash premium without an additional contingent premium unless the company has a surplus which is not less in amount than the capital stock required, at the time of the organization of such mutual insurance company, of

domestic stock insurance companies writing the same kind of insurance; but said surplus shall not be less than one hundred thousand dollars."

The Circuit Court of Appeals said with regard to this section, "It is our view that compliance with Section 8909 is a prerequisite to the creation of a contingent liability." (R. 100.)

This section, it is true, provides that the maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application, but does not provide, nor can it be logically or fairly implied, that a policy issued without an application is invalid or that any of its provisions are invalid. The Circuit Court of Appeals says that the policy issued to the respondent is valid except as to the provision contained in it for contingent liability. This conclusion petitioner contends is not supported by the decision of any court, the provisions of the statute itself or other applicable sections of the same statute. Petitioner contends it to be fundamental that particular sections of statutes are to be construed in harmony with the other sections of the same act and that particular sections are to be considered and applied with reference to the legislative objective of all sections of the same act and applicable decisions of the courts.

Petitioner contends that the third and last sentence of Section 8909 made it legally impossible for Central Mutual to issue a policy that did not contain a provision for contingent liability. This section of the Iowa statute merely augments the sections of the Illinois statute under which Central Mutual was organized. It is a matter of common knowledge that seldom, if ever, is a formal application executed by a policyholder for an automobile casualty policy. The policyholder in the case at bar

through negotiation with the duly authorized agent of the Central Mutual in Iowa arranged for the execution and delivery of this policy (R. 60). It accepted the policy, had ample opportunity to observe that it contained a contingent liability provision, filed the policy in seven or eight states as a prerequisite to operating its automative equipment therein, became involved in a number of losses, which it referred to Central Mutual and accepted all the benefits accruing from membership in the company (R. 67). For such a policyholder at this time when the rights of innocent third parties have intervened to avoid its just and lawful assessment simply because no application was executed containing the contingent liability provision is not only unfair and inequitable but opposed to the great weight of authority in similar cases throughout the United States.

Petitioner calls the court's attention to Sections 8974 and 8975 of the same Iowa insurance code. Section 8974 provides that all insurance companies or associations shall upon the issue or renewal of any policy attach to such policy or endorse thereon a true copy of any application or representation of the assured which by the terms of the policy are made a part thereof or which may in any manner affect the validity of the policy. *Section 8975 provides that omission to attach a copy of the application shall not render the policy invalid but does prevent the insurance company from pleading or proving any such application or any part thereof or the falsity thereof in any action on the policy.*

These sections are part of the same Iowa Insurance Code, of which Section 8909 is a part, and all should be read and considered together.

There are three decisions of the Supreme Court of Iowa, which have passed on Sections 8974 and 8975. All of these

decisions lay down the unqualified rule that they apply to all kinds of policies issued by any kind of an insurance company doing business in the State of Iowa. These decisions are *Cook* v. *Federal Life Assn.*, 74 Iowa 746, 35 N. W. 500, *Grimes* v. *Northwestern Legion of Honor*, 97 Iowa 315, 64 N. W. 806, and *Corson* v. *Iowa Mutual Fire Insurance Assn.*, 115 Iowa 485, 88 N. W. 1086.

From these decisions it appears to be definitely established that the policy in the case at bar was valid. As a matter of fact, the Circuit Court of Appeals admits the policy to be valid but says the assessment provision is not enforceable because of failure to comply with the statutory provision regarding attachment of an application containing the contingent liability provision. The language of the Circuit Court of Appeals is as follows:

> "Even though the policy be valid, the assessment provision is not enforceable because of a failure to comply with a requirement of the statutory provision pertaining thereto." (R. 100)

We have been able to find no case in Iowa construing Section 8909. There are, however, numerous decisions of the courts of last resort in many of the states which go deeply into the questions involved on the assessment of policyholders in the mutual insurance organizations where there may be some omission or defect in expressing the contingent liability.

The case of *Pink, Superintendent of Insurance of the State of New York* v. *Town Taxi Co., Inc.*, 138 Maine 44, 21 Atl. (2nd) 656, decided in 1941 by the Supreme Judicial Court of Maine examines these questions thoroughly. Pink, as Superintendent of Insurance of the State of New York, instituted suit in Maine against Town Taxi Co., Inc. for collection of an assessment levied against all

policyholders by virtue of certain New York statutory provisions relating to contingent liability of members of mutual insurance companies. The company in question was organized under New York laws and its by-laws provided that "the members of the corporation shall be the policyholders herein." The by-laws also provided for the making of assessments when required and provided that the contingent liability of the members should be not less than an amount equal to twice the amount of the premium written in the policy. These by-laws were not set out in the policy but on the back of the policies was a notice informing the insured that by virtue of the policy he was a member of the company and informing him of the nature of his contingent liability.

The court said that it was not necessary to have an express promise to pay an assessment, that membership in a mutual company made it obligatory on members to bear their proportion of assessments "not because they promised in so many words in the contract of insurance to pay assessments but because they saw fit as policyholders to become members of a mutual insurance corporation operating under the assessment plan."

To the same effect, see *Commonwealth ex rel Schnader, Attorney General* v. *Keystone Indemnity Exchange,* 335 Penn. 333, 6 Atl. (2nd) 821.

This case involved a similar liquidation where the policies, contrary to the Pennsylvania statutes and the by-laws of the company, expressly provided that they were non-assessable. In a suit to collect assessments the court held that the policyholders were liable to assessment notwithstanding the express provision to the contrary. Assessment suits were successful on the same policies in Maryland, *Taggart, Insurance Commission* v. *Wachter* (Md.) 21 Atl. (2nd) 141.

CONCLUSION.

It is extremely important that the law be settled on the points involved in this case. The rights and obligations of members, and policyholders, and rights of third party claimants, who have personal injury, death and property damage claims spread out over a great many states, are involved, as is usual in similar liquidations. The insurance departments of the various states must have some guide upon which to determine the administration of mutual assessment insurance company affairs, the possibility of recovery in the event of liquidation and how to proceed in the liquidation.

It appears unusual that the court as against innocent third parties would even consider the Fourth Defense, that there was no application attached to the policy, where the assessment liability was clearly expressed and known to respondent. And respondent was a party to this alleged improper omission in accepting a policy without the application. Under the Iowa statute which prohibited the company from relying on any representations not expressed in the application, the respondent was in a better position than if it had signed an application. And, could it not be logically argued that respondent might not want to fill in the answers to all questions in the application? In any event, how was respondent harmed by having no application? Here respondent was running its trucks over the various states and subjecting persons to possibility of injury with no redress on its policy. The local insurance agent here was requested from the main office to secure such an application (R. 60), but apparently failed so to do. This does not look like any wrongful dealing on the part of the

company and the respondent certainly knew of the assessment liability.

As to the insolvency defense, if this is sustained, it will make it absolutely impossible to consider the liability of policyholders in a mutual assessment insurance company as an asset. If unusual losses occur, a mutual insurance assessment company will ordinarily have to be closed immediately until assessments are collected or wait until it is determined that there are sufficient other assets to pay all claims. This would appear to require that the insurance departments should have a day to day report from the company or keep one of its representatives in charge of the books and records. The respondent elected to insure in a mutual assessment company and thereby secure the benefits of a lower premium. It was, as has been stated by innumerable courts, both an insured and insurer.

All banks and other corporations are prohibited from operating while insolvent, yet when they become insolvent, collection is made upon the stockholders' liability for the benefit of creditors; and the same course should be open for third parties to collect through the receiver the assessment liability of mutual assessment insurance company policyholders. This is the purpose of the liability.

It is respectfully submitted that the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX.

Sections of Iowa Statutes.

8909. Maximum premiums. The maximum premium payable by any member of a mutual company shall be expressed in the policy and in the application for the insurance. Such maximum may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium, which premium may be made payable in installments or regular assessments. No policy shall be issued for a cash premium without an additional contingent premium unless the company has a surplus which is not less in amount than the capital stock required, at the time of the organization of such mutual insurance company, of domestic stock insurance companies writing the same kind of insurance; but said surplus shall not be less than one hundred thousand dollars.

8955. Foreign mutual companies—surplus. Any mutual insurance company organized outside of this state and authorized to transact the business of insurance on the mutual plan in any other state of the United States or in the District of Columbia, may be admitted to this state and authorized to transact herein any of the kinds of insurance authorized by its charter or articles of incorporation, when so permitted by the provisions of this chapter, with the powers and privileges and subject to the conditions and limitations specified in said chapter; provided, however, such company has complied with all the statutory provisions which require stock companies to file papers and to furnish information and to submit to examination, and is also solvent according to the requirements of this chapter and is possessed of a surplus safely invested as follows:

1. In case any such mutual company issuing policies for a cash premium without an additional contingent liability equal to or greater than the cash premium, the surplus shall be at least two hundred thousand dollars.

2. In case of any other such mutual company issuing policies for a cash premium or payment with an additional contingent liability equal to or greater than the cash premium or payment, the surplus shall be such an amount as the commissioner of insurance of Iowa may require, but in no case less than fifty thousand dollars, provided that the provisions of this section fixing a minimum surplus of fifty thousand dollars shall not apply to companies now admitted to do business in Iowa; provided, however, that no such mutual company shall be authorized to transact compensation insurance without a surplus of at least two hundred thousand dollars unless all liability for each adjusted claim in this state, the payment of any part of which is deferred for more than one year, shall be provided for by a special deposit, in a trust company of this state, which shall be a trust fund applicable solely and exclusively to the payment of the compensation benefits for which such deposit is made, or shall be reinsured in an authorized stock company, or in an authorized mutual company with a surplus of at least two hundred thousand dollars.

8974. Copy of application—duty to attach. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy.

8975. Failure to attach—effect. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 8974 it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option.